

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHERINE NEWTON and SOCIAL SECURITY ADMINISTRATION,  
OFFICE OF HEARINGS & APPEALS, Dallas, TX

*Docket No. 03-926; Submitted on the Record;  
Issued June 12, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$1,930.20 was created; (2) whether the Office properly found appellant at fault in creating the overpayment; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$281.26 from appellant's continuing compensation payments.

On April 29, 1997 the Office accepted that appellant sustained bilateral carpal tunnel syndrome causally related to her federal employment as a management services assistant. Appellant worked intermittently and again stopped working on August 15, 2001. The Office began paying compensation for temporary total disability. Effective October 7, 2001, appellant received compensation payments from the periodic rolls.

On January 7, 2002 appellant returned to work in a full-time position. Appellant stopped working on February 5, 2002. The Office continued to issue compensation payments for temporary total disability; on January 26, 2002 the Office issued a payment of \$1,802.26 for the period December 20, 2001 to January 26, 2002. On February 23, 2002 the Office issued a payment of \$1,799.90 for the period January 27 to February 23, 2002.

On April 26, 2002 the Office advised appellant that a preliminary finding had been made that an overpayment of \$4,887.38 was created as appellant returned to work on January 7, 2002 but received compensation through March 24, 2002. The Office also made a preliminary finding that appellant was at fault in creating the overpayment.<sup>1</sup>

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<sup>1</sup> The record indicates that appellant requested a prerecoupment hearing on the overpayment and fault issues, but then withdrew her request.

By decision dated July 23, 2002, the Office determined that the actual amount of the overpayment was \$1,930.20, representing compensation received while working from January 7 through February 5, 2002.<sup>2</sup> The Office determined that appellant was at fault in creating the overpayment because she accepted payments she should have known were incorrect. It was further determined that appellant should repay the overpayment by deducting \$281.26 from her continuing compensation payments.

The Board finds that the Office properly determined that an overpayment of \$1,930.20 was created.

In this case, appellant does not contest that she returned to full-time work from January 7 through February 5, 2002. A claimant is not entitled to receive compensation for temporary total disability for a period that she was working for the employing establishment. Since appellant did receive compensation for temporary total disability covering this period, an overpayment of compensation was created. The Office determined and the Board concurs that for the period January 7 through February 5, 2002, appellant received \$1,930.20 in compensation.

The Board further finds that the Office properly found appellant to be at fault in creating the overpayment.

The Office may consider waiver of the overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>3</sup> On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact, which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

The record indicates that the Office issued payments on January 26 and February 23, 2002 that covered the period appellant was working at the employing establishment. Appellant stated on an overpayment recovery questionnaire (OWCP-20) that she assumed she was still entitled to compensation as she did not hear from the Office. It is, however, appellant’s obligation to notify the Office upon her return to work. When appellant initially began receiving compensation in 1997, she was advised in a Form CA-1049 that she must notify the Office immediately when she returned to work in order to avoid an overpayment. Appellant returned to work on January 7, 2002; when she received a compensation payment dated January 26, 2002 covering the period December 30, 2001 to January 26, 2002, she should have known it was incorrect. Similarly, when she received a February 23, 2002 payment covering a period that commenced on January 27, 2002, she should have known it was incorrect. The Board finds that appellant accepted payments she should have known were incorrect and, therefore, under 20 C.F.R. § 10.433(a)(3) she is at fault and is not entitled to waiver of the overpayment.

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<sup>2</sup> The cover letter stated that the amount was \$1,931.10; however, the accompanying memorandum and worksheets indicate that the amount was \$1,930.20.

<sup>3</sup> 20 C.F.R. § 10.433(a).

The Board further finds that the case is not in posture for decision with respect to the recovery of the overpayment.

Section 10.441(a) of the Office's regulations provides:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."<sup>4</sup>

In this case, appellant submitted an overpayment recovery questionnaire providing information about her financial circumstances. The July 23, 2002 decision makes the following findings with respect to recovery of the repayment:

"[Appellant] has agreed to have the overpayment deducted from her compensation checks. Since no agreement was made regarding the amount of the deductions each 28 days, the Office will deduct the allowable maximum of 15 percent of her compensation each 28 days."

The Office does not provide any explanation or citation of authority with respect to an "allowable maximum of 15 percent" of compensation. The regulations require that the Office make its determination based on relevant factors particular to the individual case, including the financial circumstances of the overpaid individual. There is no indication in this case that the Office considered the relevant evidence as required by section 10.441(a). Accordingly, the case will be remanded to the Office for a proper determination as to the recovery of the overpayment. After such further development as the Office deems necessary, it should issue an appropriate decision.

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<sup>4</sup> 20 C.F.R. § 10.441(a).

The decision of the Office of Workers' Compensation Programs dated July 23, 2002 is hereby affirmed with respect to the amount of overpayment and the finding of fault; it is remanded for further action consistent with this decision of the Board with respect to recovery of the overpayment.

Dated, Washington, DC  
June 12, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member